

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

IRVIN E. WILSON)	
Claimant)	
VS.)	
)	Docket No. 1,031,161
RUSKIN COMPANY)	
Respondent)	
AND)	
)	
INSURANCE CO. OF STATE OF PENNSYLVANIA)	
Insurance Carrier)	

ORDER

Respondent requested review of the May 30, 2012 Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on October 9, 2012.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Troy A. Unruh, of Pittsburg, Kansas, appeared for respondent and its insurance carrier. E.L. Lee Kinch, of Wichita, Kansas, was appointed as a Board Member Pro Tem in this case due to the retirement of Board Member David A. Shufelt.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award, with one exception, the stipulated date of accident is February 16, 2006, rather than March 16, 2006 as is listed in the Award.¹ At oral argument to the Board, the parties agreed that claimant has suffered a 30 percent whole person permanent partial disability on a functional basis as the result of the accident which occurred on February 16, 2006.

¹ R.H. Trans. at 4.

ISSUES

The Administrative Law Judge found claimant to be permanently and totally disabled based on the opinions of board certified orthopedic surgeon Edward J. Prostic, M.D., the only medical opinion provided in this case and Karen Crist Terrill, the only vocational expert to testify in this matter. Neither Dr. Prostic nor Karen Crist Terrill were cross examined during the litigation of this claim.

The respondent requests review of whether claimant proved by admissible evidence that he is permanently and totally disabled. Respondent argues that the Award should be reversed and claimant denied compensation because Dr. Prostic's and Karen Crist Terrill's opinions that claimant is permanently and totally disabled were based on inadmissible evidence, in violation of K.S.A. 44-519.

Claimant argues that the Award should be affirmed as respondent failed to provide any evidence to controvert the ALJ's finding that he can't work. Additionally, claimant argues that respondent failed to object, at the time of the regular hearing and at the time of the depositions, to any of the evidence now alleged to be inadmissible.

FINDINGS OF FACT

Claimant worked as a laborer for respondent, a sheet metal manufacturing company. He suffered injury while working for respondent on February 16, 2006, the stipulated date of accident in this matter.² On the date of accident, claimant was emptying a barrel of pins that was heavier than claimant thought and his back popped. Claimant reported the incident. The next day, claimant had another incident where his back popped again and his "legs went out" as he was taking a load of scrap out to a barrel.³ Claimant again reported the incident. Claimant was sent to Dr. Jimmy Buller, in Parsons, Kansas, and was given pain medication and sent for an MRI.

Claimant met Dr. Edward J. Prostic on October 30, 2006, with complaints of continued pain in the left side of his low back at waist level with radiation down the left leg to the anterolateral calf, numbness and paresthesia of the thigh, and stiffness and soreness in the morning. Claimant's pain was worsened by sitting, standing, walking, bending, squatting, twisting, lifting, pushing, pulling and coughing. Dr. Prostic recommended steroid injections.

² R. H. Trans. at 4; Claimant's Depo. at 6. The date of accident is mistakenly identified as March 16, 2006, at several places in this record. The parties stipulated to the February 16, 2006 date of accident at oral argument before the Board.

³ Claimant's Depo. at 11.

Dr. Prostin found claimant to have grade II spondylolisthesis at L5-S1 and possible herniation of the disk at L4-5. Epidural injections were initially suggested and surgery was discussed if the injections were not successful. At that time, Dr. Prostin found claimant capable of working light to medium level work.

Claimant was referred to Dr. Brian Ipsen, in Joplin, Missouri, who recommended surgery. Claimant opted for surgery over the injections and underwent a 360-degree arthrodesis of L5-S1 with decompression at L4. The surgery was performed at St. John's Regional Medical Center on October 28, 2008. Claimant obtained insufficient pain relief from the surgery and continues to have pain in his back and legs. Claimant was then treated with Lidoderm patches and additional narcotics. Claimant was released to return to work with restrictions but was not accepted back to work by respondent.

Claimant sought medical treatment on his own with Dr. Beth Shelton, a physiatrist in Parsons, Kansas, after he was released by Dr. Ipsen with restrictions. Claimant relates his complaints of constant low back pain and radiating left leg pain to his injury while working for respondent. Claimant reports having difficulty sleeping, which leaves him tired and makes it hard to concentrate. He takes two to three naps during the day. The longest claimant can go without pain while sitting is 30 minutes. He can go 15 - 20 minutes standing without pain. Claimant testified that he wouldn't be able to concentrate in a sit down job because of his pain and drowsiness from lack of sleep. Claimant doesn't believe that there is a job that he can do.

Claimant testified that when he was released with restrictions, respondent had no work for him within his restrictions. He then applied for social security disability compensation, which was awarded.

Dr. Prostin met with claimant again on February 23, 2010. Claimant continued to report pain in the center of his low back without radiculopathy. During the examination, Dr. Prostin found claimant displayed tenderness in the midline and over the paraspinal muscles bilaterally. Claimant's range of motion was limited, but, he was able to walk on his toes and heels and could squat to one-half of normal. No atrophy was identified in either leg, no neurologic deficit was found in either leg and the straight leg raise maneuver was negative. Dr. Prostin opined that claimant sustained injury to his low back during the course of his employment with respondent, aggravating pre-existing spondylolisthesis. He went on to say that claimant is most likely totally disabled from gainful employment as he is currently unable to do more than light duty work coupled with the restriction that he be able to change position as necessary for comfort.

Dr. Prostin found claimant to have a 30 percent functional impairment to the body as a whole, based upon the AMA Guides, 4th ed. Although he had determined that claimant is permanently and totally disabled, Dr. Prostin was asked to review the report of Karen Terrill for the purpose of determining claimant's task loss. Dr. Prostin felt that, as of

February 23, 2010, claimant sustained a task loss of 89 percent, being unable to perform 39 out of 44 tasks.

Dr. Prostic was informed at this deposition that claimant's date of accident was February 16, 2006, and not March 16, 2006, the date that Dr. Prostic indicated in his reports as claimant's date of accident.⁴ Dr. Prostic was shown the restrictions of Dr. Ipsen at his deposition. He agreed that he would not change any of Dr. Ipsen's restrictions. However, Dr. Prostic also provided his own restrictions on claimant limiting claimant to light duty employment with the ability to change position as necessary for comfort.⁵ His report of February 23, 2010, mentions Dr. Ipsen's surgery on claimant, but does not discuss Dr. Ipsen's restrictions.

Vocational expert Karen Crist Terrill performed a vocational assessment on claimant by telephone on May 5, 2010. She also utilized the March 16, 2006 date of accident in her assessment of claimant. In order to complete her assessment of claimant, Ms. Terrill reviewed medical records from Dr. Ipsen and the October 30, 2006 report of Dr. Prostic. Both sets of records were utilized in completing her report on claimant.

Ms. Terrill determined that claimant performed 44 tasks in the 15 years preceding the accident. After reviewing claimant's medical records from both Dr. Ipsen and Dr. Prostic, she determined that claimant was unable to engage in any type of substantial gainful employment. It is unclear, based upon her report and testimony, whether Ms. Terrill's opinion is based upon the medical records of Dr. Ipsen, Dr. Prostic, or both. However, she noted in her report that Dr. Prostic limited claimant to "light/medium-level employment".⁶ Those restrictions originated in Dr. Prostic's October 30, 2006 report.

At the time of her deposition, Ms. Terrill was then provided Dr. Prostic's February 23, 2010 report. Ms. Terrill then testified, based upon Mr. Wilson's lack of transferable skills and the limitations placed upon him by the physicians, and after reviewing both Dr. Prostic's and Dr. Ipsen's medical reports, that claimant is unable to engage in any type of substantial gainful employment. Ms. Terrill was not asked her opinion regarding claimant's employability based solely on the opinions and medical findings of Dr. Prostic.

⁴ Prostic Depo. at 4-5.

⁵ Prostic Depo., Ex. 2 at 3 (Dr. Prostic's Feb. 23, 2010 Supplementary Report).

⁶ Terrill Depo., Ex. 2 at 2.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁷

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁸

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁹

K.S.A. 2000 Furse 44-510e(a) defines functional impairment as:

"...the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein."

There is only one functional impairment opinion in this record. Dr. Prostic found claimant to have suffered a 30 percent functional whole body impairment as the result of the injuries suffered while at respondent. As noted above, the parties have stipulated to this functional impairment rating for the purposes of this litigation.

The Board finds that claimant has suffered a 30 percent permanent partial whole body functional disability as the result of the injuries suffered on February 16, 2006, while working for respondent. The Award of the ALJ is affirmed on this finding.

K.S.A. 2000 Furse 44-519 states:

Except in preliminary hearings conducted under K.S.A. 44-534a and amendments thereto, no report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and

⁷ K.S.A. 2000 Furse 44-501 and K.S.A. 2000 Furse 44-508(g).

⁸ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁹ K.S.A. 44-501(a).

shall not be competent evidence in any case where testimony of such health care provider is not admissible.

Respondent argues that the ALJ erred in finding claimant to be permanently and totally disabled based upon the opinions of Dr. Prostic and Karen Crist Terrill. As noted above, neither Dr. Prostic nor Karen Crist Terrill were cross examined during the litigation of this claim. Respondent correctly argues that Ms. Terrill's initial opinion in her report, appears to consider the medical records of Dr. Ipsen. The Kansas Supreme Court, in *Roberts*¹⁰ restricted the opinions of vocational experts, requiring that they utilize only medical reports of health care providers that have testified in the matter at hand. The Court held "Opinions formed by vocational rehabilitation experts relying upon evidence from nontestifying health care providers are based on an insufficient foundation and are prohibited by K.S.A. 44-519".¹¹

Ms. Terrill listed both Dr. Prostic and Dr. Ipsen as sources utilized in preparing her report. She was never asked for an opinion as to claimant's employability based only upon the opinions of Dr. Prostic. The opinion of Ms. Terrill that claimant is unable to engage in any type of substantial gainful employment appears to violate the Courts ruling in *Roberts*. It is acknowledged that there were no objections to any of the testimony and evidence in this matter. But the Court in *Roberts* determined that K.S.A. 44-519 is not a technical rule of evidence. "Rather, it is a specific legislative mandate".¹² Ms. Terrill's opinion regarding claimant's employability violates *Roberts* and will not be considered by the Board.

This Supreme Court ruling, even while prohibiting the opinion of Ms. Terrill from consideration, does not exclude from the record the task list prepared by Ms. Terrill as that list was created utilizing information from claimant's past work history and does not appear to rely on any information obtained from Dr. Ipsen.

The Board notes that there is, in this record, another expert opinion finding claimant to be permanently and totally disabled. Dr. Prostic also found claimant incapable of working due to the work injury suffered by claimant while working for respondent. Respondent argues that Dr. Prostic wrongfully sought to adopt the restrictions and opinions of Dr. Ipsen, contrary to his own final medical opinion. But the Supreme Court, in *Roberts*, also addressed the use by a health care provider of medical reports not placed into the record. The Court stated that medical experts may rely upon the reports of nontestifying physicians in forming their own opinions. The Court went on to explain that medical experts have the training and experience to interpret and evaluate the soundness of other medical reports and also have the expertise to form their own medical opinions. Vocational

¹⁰ *Roberts v. J.C. Penney Co.*, 263 Kan. 270, 949 P.2d 613 (1997).

¹¹ *Id.*, Syl ¶ 5.

¹² *Id.* at 278.

rehabilitation experts do not have that medical expertise and are not competent to assess the soundness of the medical opinions in the reports of health care providers.¹³ Therefore, respondent's objection to Dr. Prostic's opinion based upon his use of Dr. Ipsen's medical reports is rejected by the Board.

Respondent appears to infer that Dr. Prostic merely adopted the restrictions and opinions of Dr. Ipsen and did not independently reach his own final medical opinion. However, a review of Dr. Prostic's deposition does not support this allegation. While Dr. Prostic did review Dr. Ipsen's reports, he also conducted two separate examinations of claimant. After the second exam, Dr. Prostic determined that claimant's condition had worsened and his ability to perform work had deteriorated from the light/medium level, to the light duty employment only. Dr. Prostic also determined that claimant's task loss had gone from 55 percent to 89 percent. In his report of February 23, 2010, Dr. Prostic mentions Dr. Ipsen only in discussing the surgery performed upon claimant. He does not discuss any restrictions placed upon claimant by any health care provider other than himself. The Board finds that Dr. Prostic's opinions regarding both claimant's functional impairment and his permanent work disability are his own, formulated from his examinations of claimant, a review of claimant's medical history and after considering the task list created by Ms. Terrill. Dr. Prostic's opinion that claimant is permanently and totally disabled is uncontradicted in this record as respondent presented no evidence to rebut that determination.

K.S.A. 2000 Furse 44-510c(a)(2) states:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

The Board finds that claimant is permanently and totally disabled as the result of the accident on February 16, 2006 and the resulting injuries sustained on that date. The award of the ALJ finding claimant permanently and totally disabled is affirmed.

¹³ *Id.*, Syl. ¶ 6.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to show a date of accident on February 16, 2006, but affirmed in all other regards.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated May 30, 2012, is modified to find a date of accident on February 16, 2006, but affirmed in all other regards.

IT IS SO ORDERED.

Dated this _____ day of October, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENTING AND CONCURRING OPINION

We disagree that the vocational expert's opinion that claimant has no transferable job skills and is unable to engage in any type of substantial gainful employment should not be considered. These opinions were offered without objection. Although Dr. Ipsen did not testify, his restrictions were read to Dr. Prostic at Dr. Prostic's deposition. Dr. Prostic testified that he would not change any of those restrictions. This means that Dr. Prostic agreed with those restrictions. Because Dr. Prostic as a medical expert, agreed that those restrictions were reasonable and appropriate for claimant those restrictions are in the

record as Dr. Prostic's restrictions and Ms. Terrill appropriately considered them in forming her own opinion on claimant's employability in the open labor market.

We otherwise agree with the opinion of the majority.

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